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November 5, 2007

Office of Electricity Delivery and Energy Reliability, OE-20
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585-0001

Attn: Docket No. 2007-OE-01, Mid-Atlantic Area
National Interest Electric Transmission Corridor

Dear Sir:

Enclosed for filing in the above-referenced docket is the Application for Rehearing of Governor Timothy M. Kaine and Attorney General Robert F. McDonnell on behalf of the Commonwealth of Virginia.

Thank you for your attention to this matter.

Yours truly,

Maureen Riley Matsen
Deputy Attorney General

cc: The Honorable Timothy M. Kaine
Virginia Congressional Delegation

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY

Mid-Atlantic Area
National Interest Electric
Transmission Corridor

Docket No. 2007-OE-01

APPLICATION FOR REHEARING OF GOVERNOR TIMOTHY M. KAINE AND ATTORNEY GENERAL ROBERT F. McDONNELL, ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

Pursuant to § 313 of the Federal Power Act, 16 U.S.C. § 825*l*, and Ordering Paragraphs C and E of the Department of Energy's ("DOE") October 2, 2007 Order issued in the above-captioned docket ("Designation Order"), Governor Timothy M. Kaine and Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, hereby apply for rehearing of the DOE's designation of the Mid-Atlantic Area National Interest Electric Transmission Corridor ("NIETC).[1] The Commonwealth of Virginia respectfully submits that the Designation Order is contrary to law, in excess of DOE's statutory authority, and fails to observe procedure required by law. Specifically, DOE has failed to consult with Virginia in conduct of the congestion study that served as the basis for its NIETC designations, in contravention of its explicit legal obligation to do so. Therefore, DOE's designation of the Mid-Atlantic Area NIETC is unlawful.[2]

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[1] National Electric Transmission Congestion Report and Order, DOE Docket Nos. 2007-OE-01 and -02, 72 Fed. Reg. 56,992 (Oct. 5, 2007) (hereinafter "Designation Order"). Ordering Paragraph C of the Designation Order grants the Commonwealth party status and directs any party who, like the Commonwealth, is aggrieved by the Designation Order to file an application for rehearing pursuant to Federal Power Act § 313. The Commonwealth is a party by virtue of the July 6, 2007 comments filed jointly, and on its behalf, by Governor Kaine and Attorney General McDonnell

[2] The DOE designated the following Virginia counties as part of the Mid-Atlantic Area NIETC: Arlington, Clarke, Culpeper, Fairfax, Fauquier, Frederick, Loudon, Madison, Page, Prince William, Rappahannock, Rockingham, Shenandoah, Stafford, Warren; and the following Virginia cities: Alexandria, Harrisonburg, Fairfax, Falls Church, Manassas, Manassas Park, and Winchester. *See* Designation Order at ¶ 57,025.

I. INTRODUCTION

The Energy Policy Act of 2005 authorizes the Secretary of Energy ("Secretary" or "DOE") to designate NIETCs, and provides specific procedures for doing so. *See* 16 U.S.C. § 824p. The procedures for designating a NIETC include, among other things, performance of a congestion study by the DOE, every three years. By statute, these studies must be conducted "in consultation with affected States." 16 U.S.C. § 824p(a)(1). The congestion studies, in turn, form the foundation for the DOE's NIETC designation(s). 16 U.S.C. § 824p(a)(2).

The designation of an NIETC has serious and far reaching implications for the sovereign interests of the States. Congress recognized as much when it required consultation with affected States. First and foremost, it results in transferring the authority to site transmission facilities in NIETCs from State utility commissions – familiar with the important conditions and concerns both within and without their jurisdiction – to the Federal Energy Regulatory Commission, without any basis in the performance of the States in this regard to date. Establishment of this FERC "backstop" authority represents a monumental shift in policy whereby federal law can preempt States' traditional jurisdiction over electric transmission line siting, an issue of largely local concern, which was exclusive to the States prior to the enactment of the Energy Policy Act of 2005. Established, long-standing state siting laws and processes can now be displaced by a new and untested federal administrative process that would begin at the behest of private companies proposing a project, when a state commission for any reason takes more than one year to approve a proposed transmission project, or for any reason declines to approve it. Because the transmission needs of Virginia and the region have

been addressed by Virginia efficiently and effectively for decades, the critical nature of DOE's consultation with Virginia as an affected state prior to designating NIETC areas cannot be overstated.

Virginia's laws, policies, and practices have in no way ever conflicted or interfered with the energy needs of the Mid-Atlantic region. Indeed, Virginia's performance in this regard has, and continues to, inure to the benefit of the region. Nevertheless, the Designation Order includes significant portions of Virginia within an area designated as the Mid-Atlantic Area NIETC.

The DOE cannot, however, lawfully include any part of Virginia in a NIETC without first conducting a congestion study in consultation with Virginia and other affected States. This it has not done. Thus, the designation is *ultra vires* and must be reconsidered.

II. SPECIFICATION OF ERRORS

The Commonwealth of Virginia respectfully submits that the Designation Order is contrary to law, in excess of DOE's statutory authority, and fails to observe procedure required by law.[3] The Commonwealth specifies the following errors:

1. DOE has unlawfully failed to satisfy the statutory requirement to consult with Virginia in preparing its congestion study. *See* 16 U.S.C. § 824p (a); *Director v. Greenwich Colleries Director,* 512 U.S. 267 (1994); *Hathorn v. Lovorn,* 457 U.S. 255 (1982).

[3] *See* 5 U.S.C. § 706. Courts review decisions entered pursuant to the Federal Power Act under the standards of the federal Administrative Procedure Act. *See, e.g., Wisconsin Valley Improvement Co. v. FERC,* 236 F.3d 738, 742 (D.C. Cir. 2001).

2. The DOE has exceeded its statutory authority by including portions of Virginia within a NIETC without consulting with Virginia in preparing its congestion study, as required by law. *See* 16 U.S.C. § 824p (a); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U.S. 178 (1920); *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001).

III. ARGUMENT

A. The Designation of Virginia as Part of the Mid-Atlantic Area NIETC is Inconsistent With Clear and Unambiguous Procedural Requirements and Exceeds DOE's Lawful Authority.

Section 216(a) of the Federal Power Act, 16 U.S.C. § 824p (a), mandates the process for designating a NIETC. The law provides, in relevant part, as follows:

> (a) Designation of national interest electric transmission corridors
>
> (1) Not later than 1 year after the date of enactment of this section and every 3 years thereafter, the Secretary of Energy (referred to in this section as the "Secretary"), in consultation with affected States, shall conduct a study of electric transmission congestion.
>
> (2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

Section 216(a) of the Federal Power Act requires that any NIETC designation be made only after an electric transmission congestion study conducted in consultation with affected States. This statutory mandate is clear and without qualification. Congress did not provide DOE with discretion to decline to consult with affected States when conducting its congestion study. Despite the clear and unambiguous statutory consultation requirement, the DOE's August 2006 transmission congestion study, upon

which DOE's NIETC designation is based, was conducted without *any* consultation with the Commonwealth of Virginia. Accordingly, non-compliance with the consultation requirement is contrary to the plain language of the statute and constitutes reversible error. *See, e.g., Director v. Greenwich Colleries Director,* 512 U.S. 267 (1994) (affirming reversal of administrative agency decision that was inconsistent with burden of proof requirement of the Administrative Procedure Act); *Hathorn v. Lovorn,* 457 U.S. 255, 269 (1982) (failure to follow federal statutory procedure for changing state voting procedure "renders the change unenforceable"); *Atlantic City Electric Co. v. Federal Energy Regulatory Commission*, 295 F.3d 1, 8 ("[I]f Congress has directly spoken to the precise question at issue, [a reviewing court] must give effect to the unambiguously expressed intent of Congress.") (quoting *Chevron v. NRDC*, 467 U.S. 837 (1984)) (internal quotations omitted).

An agency has only the authority delegated to it. *See, e.g., Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). By conducting a study without consulting with an identifiable, affected State, DOE has cast aside a fundamental tenet of administrative jurisprudence. DOE's failure to follow its statutory mandate is the type of "disregard on its part of the power of Congress and an unwitting assumption by [an agency] of authority which it did not possess." *Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U.S. 178, 188 (1920) (reversing agency action where agency failed to follow "direct and express command of the statute to the [agency]"). Congress delegated to DOE the authority to designate NIETCs only after conducting a congestion study in consultation with affected States. Absent such consultation, action taken to designate a NIETC exceeds DOE's delegated authority. *See, e.g., Gonzales v.*

Oregon, 546 U.S. 243, 260 (2006) ("Interpretive Rule [issued by the Attorney General] does not concern the scheduling of substances and was not issued after the required procedures for rules regarding scheduling, so it cannot fall under the Attorney General's [statutory] 'control' authority.") Failure to follow the mandated step of consulting with Virginia renders DOE's designation of portions of Virginia as NIETC *ultra vires*. *See* Designation Order at ¶57,014 ("National Corridor designation provides, *in a defined set of circumstances*, a potential mechanism for analyzing the need for transmission ....") (emphasis added).

Furthermore, DOE's failure to comply with the law is exacerbated by the context in which it has occurred. Although Congress has authorized the federal encroachment upon transmission siting authority, a traditional state power, it has done so only subject to, among other things, a mandatory requirement that the States be provided with specific modes of input in the DOE process. Given the sovereign interests implicated – land use, conservation, environmental, economic development, and property rights – it should not be surprising, much less cavalierly disregarded, that Congress deemed consultation with the States so important as to provide for it with express statutory language. DOE's utter failure to conform its process to that envisioned and described by Congress improperly ignores the delicate, if constitutional, policy balance struck by Congress. *Cf. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (indicating a heightened prudential concern about administrative agency interpretations that "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power.").

B. Even if DOE Could Be Excused From its Statutory Obligation, Which it Cannot, the Designation Order's Purported Excuses are Without Merit.

The Designation Order attempts to excuse DOE's failure to follow the law by claiming that "[i]t is difficult to know which States are 'affected' until the conclusions of the congestion study are known." Draft Designation Order, Fed. Reg. at ¶ 25,850 (May 7, 2007); Final Designation Order, Fed. Reg. ¶ 57002 (incorporating the Congestion Study Order's analysis of this issue).[4] In addition to ignoring the plain language of the statute, this claim is directly contradicted by the DOE's own support expressed for its Designation Order. It is internally inconsistent to use "evidence of historical, persistent congestion caused by numerous *well-known* constraints," Designation Order at ¶ 56,995 (emphasis added), as a primary basis for designating the Mid-Atlantic NIETC and at the same time claim that it was difficult to identify Virginia as an affected state. *See also* Draft Designation Order at ¶¶ 25,845, 25,848, 25,853, 25,854, 25861 (references to "well-known constraints" within the Mid-Atlantic NIETC). Moreover, the Designation Order acknowledges that at least two parties specifically requested NIETC designation of portions of Virginia. *See* Draft Designation Order ¶ 25,860. Thus, even if DOE's failure to follow the clear statutory mandate could be excused, which it cannot, DOE's rationale is without merit.

In asserting, incredibly, that the DOE has fulfilled the statutory duty to consult with affected States, Designation Order at ¶ 57,002, the Designation Order erroneously conflates its obligation under Section 216(a)(1) to consult with its obligation under

[4] Curiously, the Designation Order states that "there are practical difficulties in conducting the level of consultation that some may prefer...." Designation Order at ¶ 5,7002. Of course, this statement includes the false premise that there was *some* level of consultation with the affected states. Virginia was not consulted with *at all* during the preparation of the congestion study. There was *no* level of consultation, all preferences aside. In any event, difficulty does not excuse DOE from compliance with the express provisions of the law.

Section 216(a)(2) to allow the opportunity for all interested parties to provide recommendations and comments *after* the congestion study is released. *See* Designation Order at ¶ 57,002 (characterizing a comment period after the release of the congestion study as "additional consultation").[5] These are, however, separate statutory obligations found in different subsections of the law. Indeed, consultation during the preparation of a study is a mode of receiving important information relevant to the conclusions and recommendations expected from the study during the administrative process that is entirely distinct from, and more interactive than, simply receiving comments following the release of a study. All interested parties are afforded the opportunity to provide comments whereas only States had a statutory right to be consulted while the congestion study is being conducted. Had Congress cared only for *post hoc* comments of the States to be received with those of all other interested parties, it would not have needed the consultation language of Section 216(a)(1). But that language was included; it is not meaningless, and DOE cannot simply wish it away. Satisfying the receipt of comment provisions of Section 216(a)(2) is not sufficient to satisfy the additional statutory requirement that the States be consulted in the conduct of its congestion study.

IV. CONCLUSION

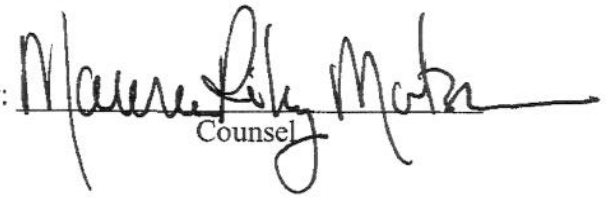
Federal law permits state siting laws and processes to be preempted in certain situations, but only subject to a specific process having been followed by federal agencies. The process leading to the Designation Order failed to comply with these

[5] In providing comments pursuant to Section 216(a)(2) during the additional comment period provided for by the DOE, the Commonwealth expressly reserved its statutory rights under Section 216(a)(1). *See* July 6, 2007 Comments of the Commonwealth of Virginia at 2, DOE Docket No. 2007-OE-01 ("we do not waive the Commonwealth's rights to object and seek legal redress of the Department's failure to comply with the statute.")

mandatory statutory requirements and therefore DOE's NIETC designations exceed the agency's lawful authority. The DOE cannot include any part of Virginia in a NIETC without first conducting a congestion study in consultation with Virginia and other affected States. Governor Kaine and Attorney General McDonnell therefore respectfully request that the DOE exercise its discretion to reconsider its order and remove from its designation all Virginia counties and cities presently – though unlawfully – included.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
GOVERNOR TIMOTHY M. KAINE,
ATTORNEY GENERAL ROBERT F. McDONNELL

By: 
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November 5, 2007

CERTIFICATE OF SERVICE

Pursuant to the Department of Energy's directive found on its Web site, http://nietc.anl.gov/rehearing/index.cfm, the foregoing Application for Rehearing is not required to be served on parties to this proceeding.